

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

13 77-60008

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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In the Matter of the Return of
Illegally Seized Property of:

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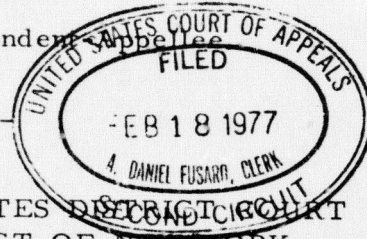
STREETWORKERS, INC.

STREETWORKERS, INC.,

Petitioner-Appellant,

UNITED STATES OF AMERICA,

Respondent



ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

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STATEMENT OF ISSUES

Did the District Court err in denying the motion made by Petitioner-Appellant Streetworkers, Inc. pursuant to Federal Rule of Criminal Procedure 41(e), for an order directing that its books and records be returned and be held inadmissible in evidence at any hearing or trial on the ground that such books and records were illegally seized by the United States Attorney for the Southern District of New York?

STATEMENT OF CASE

A. PRELIMINARY STATEMENT.

Streetworkers, Inc., the Petitioner-Appellant herein ("Streetworkers"), appeals from an order of the Honorable Thomas P. Griesa, United States District Judge, Southern District of New York, dated December 15, 1976 and entered on December 16, 1976 (the "Order"), which denied Streetworkers' motion pursuant to Federal Rule of Criminal Procedure 41(e) for an order directing that its books and records which had been unlawfully retained by the City of New York Department of Investigation and thereafter unlawfully transferred to and retained by the United States

Attorney for the Southern District of New York be returned and held inadmissible in evidence at any hearing or trial. District Judge Griesa denied Streetworkers' application on the ground that the government was serving a grand jury subpoena demanding the production of the books and records in question and had offered to make copies of the documents available to Streetworkers. The order denying Streetworkers' application was entered without prejudice to Streetworkers' right to seek further relief if the practical matters concerning Streetworkers' need for the documents could not be worked out between the parties.

B. STATEMENT OF FACTS.

Having been served with a subpoena duces tecum dated June 14, 1974, Streetworkers surrendered its corporate books and records to the City of New York Department of Investigation on June 26, 1974 (A-3).^{*} On October 16, 1975, Streetworkers requested the return of its books and records in a letter addressed to the attention of Salvatore Ranieri, the City of New York Department of Investigation attorney handling the matter (A-4, A-7). Since no response to the letter appeared to be forthcoming, a second letter was sent to

^{*} Parenthetical references are to the Appendix.

Mr. Ranieri on October 27, 1975 requesting the return of the documents (A-4, A-8). On October 30, 1975, Edward Hammock, Deputy Commissioner of the City of New York Department of Investigation, advised Streetworkers that its books and records had been turned over to the Office of the United States Attorney for the Southern District of New York ("United States Attorney") (A-4, A-9).

On January 5, 1976, Streetworkers made a formal request in writing for the return of its books and records to David Cutner, the Assistant United States Attorney in charge of the matter involving these documents (A-4, A-10). Mr. Cutner advised Streetworkers that its books and records were needed for an investigation and would not be returned for some time (A-4).

On November 19, 1976, Streetworkers again demanded the return of its books and records, but Steven Schatz, the Assistant United States Attorney who had taken over the matter from Mr. Cutner, refused to return the documents on the ground that they were still needed for an ongoing investigation (A-4). Streetworkers was therefore compelled to commence an action in the United States District Court for the Southern District of New York on November 30, 1976, pursuant to Federal Rule of Criminal

Procedure 41(e), demanding that its books and records which had been unlawfully retained by the City of New York Department of Investigation and thereafter unlawfully transferred to and retained by the United States Attorney be returned and held inadmissible in evidence at any hearing or trial (A-2). In an effort to legitimize its illegal seizure and retention of Streetworkers' books and records, the United States Attorney caused the issuance and service upon Streetworkers of a grand jury subpoena duces tecum dated December 13, 1976, the day before Streetworkers' motion was argued before District Judge Griesa, demanding the production of the very documents which had been in the possession of the United States Attorney for a period in excess of one year.

ARGUMENT

POINT I

SINCE THE UNITED STATES ATTORNEY SEIZED
STREETWORKERS' BOOKS AND RECORDS
WITHOUT A SEARCH WARRANT AND WITHOUT
STREETWORKERS' CONSENT, ITS SEIZURE OF
SUCH BOOKS AND RECORDS WAS IN VIOLATION
OF THE FOURTH AMENDMENT

It is well established that corporations are entitled to the protections afforded by the Fourth Amendment against unreasonable searches and seizures. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 206 (1946). The Supreme Court of the United States has repeatedly held it to be the point of the Fourth Amendment that any search or seizure of a protected place or thing must be predicated upon a search warrant. Stoner v. State of California, 376 U.S. 483 (1964). The seizure of Streetworkers' books and records by the United States Attorney in the instant case was made without a warrant of any kind and it therefore can survive constitutional attack only upon a showing that the surrounding facts brought the seizure within one of the exceptions to the rule requiring a lawful search warrant. Stoner v. State

of California, supra.

The only exception to the general Fourth Amendment rule which could conceivably be held to justify the seizure of Streetworkers' books and records by the United States Attorney, is that of a valid consent to a seizure without a warrant. Of course, if the United States Attorney's position is that Streetworkers consented to the seizure of its books and records, it has the burden of showing that the consent was in fact freely and voluntarily given. Bumper v. State of North Carolina, 391 U.S. 543, 548 (1968).

Since Streetworkers' books and records were transferred to the United States Attorney by the City of New York Department of Investigation without Streetworkers' knowledge, Streetworkers cannot possibly be deemed to have consented to such transfer. It therefore follows that since the United States Attorney secured the documents without a search warrant and without Streetworkers' consent, it seized the documents in violation of the Fourth Amendment.

The attempt made by the United States Attorney to legitimize its unlawful seizure by causing the issuance and service of a grand jury subpoena duces tecum dated

December 13, 1976, the day before Streetworkers' motion was argued before District Judge Griesa, is unavailing for two reasons. First, the grand jury subpoena demanded the production of the very documents which had been unlawfully seized by the United States Attorney more than a year earlier. More importantly, the United States District Court for the Southern District of New York has unequivocally held that a subpoena is not equivalent to a search warrant and that the seizure of subpoenaed items without the voluntary consent of the owner constitutes a violation of the Fourth Amendment. In Re Nwamu, 421 F.Supp. 1361, 1365 (S.D.N.Y. 1976). It is clear that Streetworkers' documents were seized by the United States Attorney without a search warrant and without Streetworkers' consent, and that such seizure therefore cannot withstand constitutional attack.

POINT II

SINCE THE SEIZURE OF STREETWORKERS' BOOKS AND RECORDS BY THE CITY OF NEW YORK DEPARTMENT OF INVESTIGATION WAS UNLAWFUL, THE SUBSEQUENT TRANSFER OF SUCH BOOKS AND RECORDS TO THE UNITED STATES ATTORNEY WAS EQUALLY UNLAWFUL AND IN VIOLATION OF THE FOURTH AMENDMENT

The fact that the City of New York Department of Investigation obtained Streetworkers' books and records pursuant to a subpoena duces tecum does not legitimize its retention of such documents subsequent to the completion of its own investigation. In so retaining the books and records and thereafter transferring them to the United States Attorney, the City of New York Department of Investigation itself unlawfully seized the documents.

It is well established that a subpoena duces tecum confers no right to seize the property referred to in the subpoena. In Re Nwamu, supra. District Judge McMahon specifically held in the cited case that a subpoena is not equivalent to a search warrant and that the seizure of subpoenaed items without the voluntary consent of the owner constitutes an unreasonable seizure in violation of the Fourth Amendment.

The facts of the Nwamu case differ from those of

the instant case in that the F.B.I. agents in Nwamu actually seized the subpoenaed items before they had been surrendered by the plaintiffs, while in the instant case the seizure made by the City of New York Department of Investigation occurred after the documents had actually been delivered by Streetworkers pursuant to the subpoena. Such distinction is not material, however, because the courts have repeatedly held that a person or body which lawfully subpoenas property is guilty of an unlawful seizure when it thereafter retains the subpoenaed items without a court order. Gay Cottons, Inc. v. Hogan, 55 Misc.2d 126, 284 N.Y.S.2d 684 (Sup. Ct. 1967); Amalgamated Union, Local 224 v. Levine, 31 Misc.2d 416, 219 N.Y.S.2d 851 (Sup. Ct. 1961); Application of Bendix Aviation Corporation, 58 F.Supp. 953 (S.D.N.Y. 1945).

The following excerpt from the Court's opinion in Application of Bendix Aviation Corporation is particularly pertinent in this regard:

"Documents, records or papers produced in obedience to a subpoena duces tecum remain the property exclusively of the person who produces them and they must be returned to him as soon as proper use and examination of them for the purpose for which they were summoned has been completed." 58 F.Supp. at 954.

When the City of New York Department of Investigation subpoenaed Streetworkers' books and records in June 1974, it did so pursuant to the authority invested in that agency by Section 803 of the New York City Charter and Administrative Code, which provides, inter alia, that:

"(c) For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any. In the event that the matter investigated involves or may involve allegations of criminal conduct, the commissioner, upon completion of the investigation, shall also forward a copy of his written report or statement of findings to the appropriate prosecuting attorney, or, in the event the matter investigated involves or may involve a conflict of interest or unethical conduct, to the board of ethics."

Section 803 of the New York City Charter and Administrative Code thus confers only limited powers on the City of New York Department of Investigation and clearly does not empower that agency to prosecute any criminal conduct or to transfer the investigated party's property to any municipal, state or federal prosecuting agency. When the City of New York Department of Investigation, subsequent to the completion of its own investigation, transferred Street-

workers' books and records to the United States Attorney, it therefore not only exceeded the powers conferred upon it by the New York City Charter and Administrative Code, but also made improper use of such documents at a time when such documents should have already been duly returned to Streetworkers. In so exercising ownership rights over Streetworkers' documents which it did not lawfully possess, the Department of Investigation unlawfully retained and in effect seized such documents. Since such seizure was not effectuated pursuant to a lawful search warrant, it must be deemed to constitute an unreasonable seizure in violation of the Fourth Amendment absent a showing that Streetworkers freely and voluntarily consented to such seizure.

It is well established that the relinquishment of property pursuant to a "forthwith" subpoena duces tecum, even on advice of counsel, does not constitute an act of voluntary surrender. Amalgamated Union, Local 224 v. Levine, supra; Application of Remy Sportswear, Inc., 16 Misc.2d 407, 183 N.Y.S.2d 125 (Ct. Gen. Sess. 1959). In the Remy Sportswear case the Court specifically held that compliance with a subpoena duces tecum represents a submission to a show of legal authority which "should not be construed to be a consent or a waiver of constitutional

rights" 16 Misc.2d at 411, 183 N.Y.S.2d at 130. In addition, the Southern District of New York has recently held that the surrender of documents pursuant to a subpoena duces tecum does not constitute a voluntary consent to their seizure for Fourth Amendment purposes. In Re Nwamu, supra.

Streetworkers, therefore, cannot be deemed to have consented to the retention and subsequent transfer of its books and records by the City of New York Department of Investigation when it surrendered its books and records to that agency in compliance with the June 1974 subpoena duces tecum. Streetworkers retained its exclusive ownership of its books and records during the entire period during which such documents were in the custody of the City of New York Department of Investigation. The seizure of Streetworkers' books and records by the City of New York Department of Investigation was therefore unlawful and the transfer of such documents to the United States Attorney was equally unlawful and in violation of the Fourth Amendment.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the order of the United States

District Court for the Southern District of New York
denying Streetworkers' motion demanding that its books and
records be returned and be held inadmissible in evidence
at any hearing or trial, be reversed.

Respectfully submitted,

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